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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-636

WILLIAM HOWARD CROSS, SR.,
Petitioner,

versus

PAT JARVIS, SHERIFF,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF GEORGIA

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

CITATION TO OPINION BELOW 1

JURISDICTION 2

QUESTION PRESENTED 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

1. Procedural Posture 3

2. Synopses of State Habeas Testimony 6

REASONS WHY THE WRIT SHOULD BE GRANTED 20

CONCLUSION 23

CERTIFICATE OF SERVICE 26

APPENDIX

"A" — Opinion of the Court of Appeals, Fifth Circuit 1a

"B" — Findings of Fact, Conclusions of Law, and Order of Superior Court, DeKalb County 8a

"C" — Opinion of the Supreme Court of Georgia 13a

"D" — Denial of Motion for Rehearing, Supreme Court of Georgia 15a

TABLE OF AUTHORITIES

Cases: Page

Alcorta v. Texas, 355 U.S. 28, 31 22,24

Allen v. Caldwell, 231 Ga. 442, 443 22,24

Barker v. Wingo, 407 U.S. 525, 529 21

Cross v. The State, 136 Ga. App. 400 3

Cross v. Georgia, 581 F.2d 102 at 104 (5th Cir. 1978) 5

Hampton v. United States, 425 U.S. 484 22,24

Johnson v. Zerbst, 304 U.S. 458, 464; 82 L.Ed. 1461 20,21,23

Washington v. Texas, 388 U.S. 14; 18 L.Ed.2d 1019 20

United States v. Agurs, 427 U.S. 97; 49 L.Ed.2d 342 23,24

Statutes:

28 U.S.C. §1257(3) 2

18 U.S.C.A. §2254 3

U.S. Constitution:

Sixth Amendment 4,25

Fourteenth Amendment 2,4,25

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF GEORGIA

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court for the State of Georgia decided on June 20, 1979, rehearing denied on July 18, 1979. Appendices C, D.

CITATION TO OPINION BELOW

The opinion of the Supreme Court for the State of Georgia, Case No. 34822, decided June 20, 1979, re-

hearing denied July 18, 1979, is as yet unreported and is set out in Appendix C hereto.

JURISDICTION

The judgment for the Supreme Court for the State of Georgia was entered on June 20, 1979, rehearing denied July 18, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTION PRESENTED

Where a State Habeas Court, after hearing the testimony of eight witnesses, finds as fact: that the Petitioner did not waive his right to call witnesses; that the State willfully withheld a crucial defense witness; that the State agents in question had lied under oath about the withholding of said witness; that the withheld witness' testimony was exculpatory, may the State appellate court ignore such findings and reverse the Habeas Court's granting of Petitioner's Writ of Habeas Corpus?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the due process clause of the Fourteenth Amendment of the United States Constitution.

STATEMENT OF THE CASE

1. Procedural Posture.

The Petitioner, William Howard Cross, Sr. (hereinafter referred to as "Cross") was convicted for the Georgia offense of bribery and sentenced to five years on April 19, 1974.

Cross appealed the above-mentioned judgment and sentence to the Court of Appeals for the State of Georgia, which Court affirmed the conviction on October 16, 1975 (see *Cross v. The State*, 136 Ga. App. 400). Cross' petition to the Supreme Court of Georgia for certiorari pursuant to the aforementioned affirmance by the Georgia Court of Appeals was denied on January 8, 1976.

On April 13, 1976, Cross filed a Petition for the Writ of Habeas Corpus pursuant to Title 18, U.S.C.A. §2254, in the Atlanta Division of the United States District Court for the Northern District of Georgia.

On July 20, 1976, the District Court issued its Order denying Cross' Petition for the Writ of Habeas Corpus.

On September 28, 1978, the United States Court of Appeals for the Fifth Circuit affirmed the District Court's denial of Cross' Petition for the Writ of Habeas Corpus. Rehearing denied November 8, 1978.

On or about November 22, 1978, Cross filed a Petition for the Writ of Habeas Corpus in the Superior Court for the County of DeKalb, State of Georgia. In said Petition Cross alleged a substantial denial of his rights under the Sixth and Fourteenth Amendments to the United States Constitution. (See ¶¶ 9, 10 and 11 of Cross' Petition for the Writ of Habeas Corpus, filed in the Superior Court of DeKalb County, State of Georgia, November 22, 1979.)

Cross factually alleged that the aforementioned deprival was derivative of the conduct of two DeKalb County Police Officers, W. C. McGlamery and R. W. Young (hereinafter "McGlamery" and "Young").

Cross factually alleged that McGlamery and Young had deprived Cross of his constitutional rights to call witnesses in his defense by conspiring to alert a certain crucial defense witness, one Marshall Blalock (hereinafter "Blalock"), of Cross' impending State trial and caused said Blalock to flee the jurisdiction beyond the subpoena power of Cross. (Blalock was a police informer who, Cross alleged, acting in complicity with the police officers, McGlamery and Young, had enticed and entrapped Cross into paying Young a bribe in the amount of $200.00. See ¶¶ 12 through 18, Cross' Petition for the Writ of Habeas Corpus, DeKalb County Superior Court, State of Georgia.)

Cross alleged that Blalock's testimony would have been crucial to Cross' defense of entrapment as Blalock was the conduit between Cross and the police officers in question.

Of crucial significance is the fact that Cross, pursuant to his Federal Habeas Corpus Petition filed in the United States District Court for the Northern District of Georgia on April, 13, 1976, had verily believed, urged upon the Court, and failed to carry his burden of showing, that it was the injudicious conduct of the trial court that caused Blalock to flee the jurisdiction. (See *Cross v. Georgia,* 581 F.2d 102 at 104 (5th Cir. 1978)). (Appendix A.)

An evidentiary hearing was conducted, pursuant to Cross' State habeas petition on January 11th, 16th and 17th, 1979.

At said hearing, Cross called *five* witnesses who testified in support of his factual allegations. Said witnesses were Charlie Smith, a member of the Georgia Bar for over 20 years who had initially represented Cross when he was arrested in early 1972; E. T. Hendon, Jr., currently a Superior Court Judge of DeKalb County, a member of the Bar of Georgia for over 20 years, who was Cross' counsel pursuant to the trial of the subject case in April, 1974 (and whose habeas testimony plays a dominant role relative to the merits of this Petition); Blalock, the police informer who was alleged by Cross to have entrapped him while acting in complicity with Officers McGlamery and Young; Blalock's wife, Peggy Blalock, whose testimony cor-

roborated Blalock's testimony relative to Blalock's dealings in the Cross matter with McGlamery and Young; and Pamela Blalock, Blalock's daughter, whose testimony further corroborated Blalock's testimony relative to Blalock's dealings with McGlamery and Young pursuant to the aforementioned allegations made by Cross as to McGlamery's and Young's conduct.

Cross also called, as an adverse witness, for the purposes of cross-examination, Police Officer McGlamery.

2. Synopses of State Habeas Testimony

References to "H.C.T. I" refer to the transcript of the hearing on January 11, 1979; "H.C.T. II" refers to the transcript of the second day of the subject hearing on January 16, 1979; "H.C.T. III" refers to the transcript of the hearing conducted on the third and final day of the subject hearing on January 17, 1979.

Lewis Marshall Blalock, (hereinafter "Blalock") testified on January 16, 1979 (references H.C.T. II) as follows:

Blalock first met McGlamery in approximately 1969. Blalock, McGlamery and DeKalb County Police Officer Robert W. Young (hereinafter referred to as "Young"), had a business relationship in 1970 and 1971 whereby McGlamery and Young worked for Blalock. H.C.T. II, 5-6.

Blalock had known the co-defendant in the subject case, Harold Johnson (hereinafter referred to as "Johnson"), since approximately 1964. During the summer and fall of 1971, due to the nature of Johnson's business, Johnson had occasion to frequent Blalock's place of business at which McGlamery and Young worked, and had occasion to speak with McGlamery quite often. H.C.T. II, 7.

In the summer of 1971, Blalock had occasion to have lunch with McGlamery and others at the Bull & Bush Restaurant when Cross entered said restaurant and McGlamery identified Cross to Blalock. Two or three days later, McGlamery told Blalock that "Big Al" was out to "get" Cross. McGlamery knew that Johnson was a good friend of Cross and that Johnson was a friend of Blalock. Blalock related to Johnson what McGlamery had told Blalock concerning Big Al getting Cross. H.C.T. II, 7-8.

During the late summer and fall of 1971, McGlamery would intermittently give information to Blalock to pass on to Johnson. In late January, 1972, McGlamery told Blalock that "Big Al" was fixing to come down on Cross and that Blalock should let Johnson know. H.C.T. II, 9-10.

Within approximately ten days after Cross' arrest pursuant to the subject conviction, McGlamery told Blalock that Blalock should make himself scarce for three or four days and Blalock went over to the Execu-

tive Park Motel in DeKalb County and stayed three or four days. H.C.T. II, 10.

While Blalock was staying at the motel, Blalock called his old friend, E. T. Hendon, Jr., who he had known for approximately 20 years and told Hendon that McGlamery had told Blalock to make himself scarce. H.C.T. II, 10-11.

In the fall of 1973 and the spring of 1974, Blalock lived at Tregony East Apartments with his wife, Peggy, and his daughter, Pamela, who was 14 years old at that time. H.C.T. II, 12.

Young was also living at the Tregony East Apartments at that time. McGlamery used to come by two or three times a week to visit with Blalock during the fall of 1973 and spring of 1974. McGlamery was in uniform and would drive a uniformed police car. The Tregony East Apartments, according to what McGlamery told Blalock, were within McGlamery's territorial patrol. When McGlamery used to come by to see Blalock at the Tregony East Apartments, Blalock's wife would see McGlamery because Blalock's wife was working as resident manager and the office was next door to Blalock's apartment. McGlamery would come by and ask Blalock to come out to the car where they would talk. H.C.T. II, 13-14.

When McGlamery used to come by to see Blalock during this period of time, Blalock's daughter, Pamela,

would see McGlamery and would always hug McGlamery's neck.

McGlamery came by one day and told Blalock that if Blalock was planning to go to Florida, he better get out because the trial judge in Cross' case was issuing a warrant for Blalock to put Blalock under bond so Blalock would have to stay in DeKalb County and go to court and testify, and that Hendon was going to serve the warrant on Blalock. McGlamery told Blalock that Sheriff Bonner had assigned two deputies to find Blalock. H.C.T. II, 13-15.

That when McGlamery told Blalock that there was a warrant out for him, Blalock went to Covington to stay with his brother for two or three days and then came back to Atlanta and stayed in a motel on Wesley Chapel Road for a couple of days. That then Blalock rented a U-Haul trailer and Blalock and his wife packed up his stuff in boxes and put the stuff in the trailer and left for Florida and never went back to the apartment in DeKalb County. H.C.T. II, 15-16.

On cross-examination by the State, Blalock testified as follows: That Blalock considered himself a messenger boy and passed information from Johnson to McGlamery and from McGlamery to Johnson. H.C.T. II, 16.

Blalock testified that he had made plans to go to Florida. Blalock testified again that McGlamery used to

come by on a regular basis at Tregony East Apartments and that McGlamery did come by and told Blalock that Sheriff Bonner had deputies looking for Blalock and that Hendon was going to serve Blalock with a subpoena. H.C.T. II, 21.

On redirect examination, Blalock testified that he left a week or two earlier than he had planned to go to Florida when McGlamery came by his apartment to tell him that Hendon was getting process and the Sheriff had deputies out looking for him. H.C.T. II, 22.

On re-cross examination, Blalock testified that he stayed with his brother in Covington and when he returned to Atlanta and stayed in the motel, he kept in communication with his wife. Blalock again testified that McGlamery told Blalock that Blalock better get going if Blalock was going because they were going to pick Blalock up and put him under bond. H.C.T. II, 23-24.

Synopsis of Testimony of E. T. Hendon Jr.

Ewell Theron Hendon, Jr. (hereinafter referred to as "Hendon") testified as follows at the Habeas Corpus hearing conducted in January, 1979:

That he is presently a Judge of the Superior Court of DeKalb County and has been a member of the Bar of the State of Georgia since 1949 and has known the witness Marshall Blalock for approximately 25 years. H.C.T. I, 12-13. That in January, 1972, Marshall Blalock (hereinafter "Blalock") telephoned him from a

motel because Blalock was concerned about his legal position in connection with a matter that was pending against Cross before Judge Dan Duke in Fulton County State Court. H.C.T. I, 15.

Hendon did not know Cross as of January, 1972. As a result of Blalock's telephone call, Hendon went to meet with Blalock at the Executive Park Motel.

Blalock told Hendon that he was awaiting a call from either McGlamery or Young and that they would let him know when the hearing before Judge Duke was completed so it would be safe for Blalock to leave the motel. H.C.T. I, at 15-16.

That Blalock told Hendon that McGlamery and Young had advised him about the hearing regarding Cross and that they would advise Blalock when it was safe to leave the motel so he wouldn't be subpoenaed to testify at the hearing.

That Hendon took on Cross' representation approximately in the fall of 1973. H.C.T. I, at 19. Hendon definitely anticipated subpoenaing Blalock to testify in Cross' behalf. Hendon testifies to his efforts made to subpoena Blalock. H.C.T. I, at 19-25.

Blalock told Hendon that Blalock did not want to give testimony in the case because Blalock was close to both McGlamery and Young and that Blalock's testimony would contradict theirs.

Hendon obtained an attachment from the trial court to have Blalock put in jail and put under bond to secure his attendance at the Cross trial. That Hendon believed at that time that the trial court had advertently or inadvertently alerted Blalock to the attachment and that Blalock had gone to Florida. H.C.T. I, at 25-28.

That based on Hendon's 25 years of experience as an attorney, Blalock's testimony was an integral part of Cross' entrapment defense and would have been a totally crucial witness because Blalock, acting as an informant for McGlamery and Young solicited and entrapped Cross. H.C.T. I, at 29-31.

Hendon testifies as to why he didn't ask for a continuance. H.C.T. I, at 31-35. Hendon testified that he was told in no uncertain terms by the trial court that he would not get a continuance and that Hendon could not make the proper showing in any event to obtain a continuance. That Hendon had requested of the trial court time to have the tapes expertly examined and was denied said request. That Hendon was told by the trial court that under no conditions would Hendon be granted a continuance that is simply the reason why he did not make the motion. That Hendon had done everything he knew how to do to get Blalock in Court to no avail. That it was imperative and necessary in order to establish Cross' defense of entrapment to have Blalock testify.

That Hendon had no admissible evidence or anything concrete to show at the time of the trial of the subject case that McGlamery and Young constituted the causation of Blalock's fleeing to Florida.

Hendon testifies again in rebuttal after the State has presented its evidence as follows: That the reason Hendon did not ask for a continuance is that the trial judge had made it abundantly clear that he was not under any circumstances going to continue the case. Further, that he was not in a position to make a legal showing; that the trial court had specifically told Hendon that the case was going to be tried. That he had told the Court prior to the trial of the case that Blalock had fled the jurisdiction and attempted to avail Cross of the Uniform Extradition Act and that the Court cut him off. H.C.T. II, at 69-71.

That he absolutely did not intentionally relinquish or abandon Cross' right to call Blalock; that, as a matter of fact, Hendon did everything in his power and authority as an attorney to get Blalock in court. H.C.T. II, at 71.

That at no time during his course of dealings with Blalock did Blalock ever tell Hendon that Blalock was in fear of Bill Cross. H.C.T. II, at 72-73.

That Blalock called him in the fall of 1978 and told Hendon that he wanted to come forward to testify because he did not think Cross ought to go to jail and that Blalock had not come forward to testify because he did not want to testify against McGlamery and Young. H.C.T. II, at 73.

On re-cross examination by the District Attorney, Hendon testified that initially, he thought it was the trial court's actions which alerted Blalock to flee the jurisdiction. That he did question McGlamery and Young regarding Blalock's departure and that McGlamery denied any involvement in said departure and that McGlamery further testified at the trial of the case that he had not seen Blalock for four months prior to the trial time. H.C.T. II, at 75-77.

Hendon testifies that Blalock indicated to Hendon that Blalock did not want to testify in the case because said testimony would involve McGlamery and Young in their part of the entrapment of Cross, and that Blalock was very close to both McGlamery and Young. H.C.T. II, at 78.

Synopsis of Testimony of Charlie Smith

Charles R. Smith (hereinafter referred to as "Smith") testified as follows:

Smith has been a member of the Bar of the State of Georgia since 1956. In the early part of 1972, Smith had occasion to represent Cross, and had been representing Cross for a number of years. H.C.T. I, 48-49.

That after Cross' arrest in DeKalb County on the subject case, the Solicitor for the State Court of Fulton County filed a motion to revoke Cross' suspended sentence based on Cross' arrest in DeKalb County pur-

suant to the subject conviction. Smith discussed with Cross the facts surrounding Cross' DeKalb County arrest in great detail. Smith attempted to subpoena but one witness to Cross' revocation hearing, Marshall Blalock. H.C.T. I, 49-50.

That Smith, over a period of four or five days, made extensive efforts to locate Blalock to serve a subpoena on Blalock. Smith went by Blalock's place of business seven to ten times attempting to locate him. Smith attempted to telephone Blalock at Blalock's residence approximately 15 to 20 times at all hours of the day to locate Blalock. Smith was never able to subpoena Blalock and Blalock never testified at Cross' revocation hearing. H.C.T. I, 50-51.

On cross-examination, Smith testified:

That Smith, although he did not know as a matter of fact that Blalock was an informer for the DeKalb County Police Department, had strong reason to believe that Blalock was an informer based on the information given Smith by Cross and the co-defendant Johnson. Smith had strong reason to believe in the early part of 1972 that Blalock was acting in collusion with McGlamery and Young to get Cross out to DeKalb County to set Cross up on this case. H.C.T. I, 51-52.

Synopsis of Testimony of Wendell C. McGlamery

Wendell C. McGlamery (hereinafter referred to as

"McGlamery") testified at the habeas hearing under cross-examination by Cross as follows:

McGlamery has been a DeKalb County Police Officer for 13 years. In 1969 he lived at the Greenacres Apartments on Glenwood Road in DeKalb County. At one period of time when he was living at the above-mentioned apartment, a fellow law enforcement officer, Deputy Sheriff Chester Powell (hereinafter referred to as "Powell") was temporarily staying with McGlamery. McGlamery was working the gambling squad of the DeKalb County Police Department at this time. H.C.T. II, 33-34.

McGlamery is aware that Cross was operating a gambling establishment and that Powell had frequented said establishment from information given McGlamery by Federal ATF agents.

McGlamery believed that Powell was getting information to Cross, so McGlamery put a tap on his own telephone without court authorization. McGlamery then told Powell that he was going to raid Cross. H.C.T. II, 34-35.

McGlamery acknowledged that he had lied to Powell about raiding Cross. McGlamery anticipated that Powell would pass information on to Cross and that the illegal tap McGlamery had on his telephone to intercept Powell's communications would reflect Powell communicating the false information given Powell by McGlamery.

McGlamery acknowledges that the false information he gave Powell was bait and that one might call what he did setting a trap. H.C.T. II, 36-37. McGlamery did not succeed in prosecuting Cross in early 1969 based on his illegal tap of Powell's communications. H.C.T. II, 37.

McGlamery acknowledged having lunch with Blalock at the Bull & Bush Restaurant in the summer of 1971 and acknowledges identifying Cross to Blalock and others. McGlamery acknowledges that he remembered his futile attempt to investigate and prosecute Cross in early 1969 at the point in time when identified Cross to Blalock in the summer of 1971. H.C.T. II, 37-38.

McGlamery testifies that at the probation revocation hearing before Dan Duke, in or about February, 1972, that he denied to the court that he knew or had ever seen Cross. H.C.T. II, 41.

McGlamery testifies that he was pretty sure he didn't go by to visit with Blalock during the Spring of 1974 immediately prior to the trial of the subject case. H.C.T. II, 42. McGlamery acknowledges that on the trial of the subject case in the spring of 1974 that he testified that he had not seen Blalock for a period of approximately four months. Nevertheless, McGlamery acknowledged that Young was living in the Tregony East Apartments where Blalock was living and that McGlamery utilized a police automobile during this period of time. McGlamery denies having alerted Blalock to the court process that had been issued against Blalock. H.C.T. II, 43-44.

On direct examination by the State, McGlamery acknowledged that Blalock was his informer and that Blalock had given him information on gambling and other criminal activity in the metro Atlanta area. McGlamery denies that he told Blalock to make himself scarce during the period of time that Cross had his probation revocation hearing on or about February, 1972. H.C.T. II, 44-45. McGlamery acknowledges that he knew Blalock was living at the Tregony East Apartments and that he used to visit and talk with him there. McGlamery again denies that he alerted Blalock to the process that was impending against Blalock. H.C.T. II, 45-46.

McGlamery testifies in response to the court's questions that McGlamery knew some time prior to the trial of the case that Blalock had been subpoenaed by virtue of Blalock's telling him so in November of 1973. H.C.T. II, 49.

Synopsis of Testimony of Peggy Blalock

Peggy Blalock testified that she has been married to Marshall Blalock for 22 years. They have two daughters, the younger daughter's name being Pamela, who is 19 years old.

In the spring of 1974, the Blalocks moved to Florida with their daughter, Pamela, from the Tregony East Apartments in DeKalb County. H.C.T. II, 25-26.

Peggy Blalock testified that she knew both McGlamery and Young and had occasion to see McGlamery during the two-month period of time prior to their leaving for Florida. That McGlamery used to come by the house quite a few times, maybe two or three times a week, in uniform and driving a police automobile. That when McGlamery would come by, Blalock would go out to talk with him in the police automobile. That on one occasion in the spring of 1974, Blalock went to stay with his brother for a couple of days. That Peggy couldn't remember whether McGlamery had been there that particular day or not. H.C.T. II, 26, 27, 28.

That Blalock stayed in Covington two or three days with his brother and then came back to a motel on Wesley Chapel Road in DeKalb County and stayed there a couple of days. That after Blalock's stay at the motel, they moved to Florida. H.C.T. II, 28-29.

Synopsis of Testimony of Pamela Blalock

Pamela Blalock testified as follows:

That Pamela was the daughter of Marshall and Peggy Blalock and that she recalled moving to Florida in the spring of 1974. That she remembered in the spring of 1974 that they lived at the Tregony East Apartments in DeKalb County. Pamela knew McGlamery and testified that McGlamery used to come by to see her father at the Tregony East Apartments. H.C.T. II, 30-31.

That McGlamery used to come by two or three times a week to see her father. That McGlamery used to come by quite a lot in the period of time just before they left to go to Florida. H.C.T. II, 31-32.

REASONS WHY THE WRIT SHOULD BE GRANTED

This Court should issue the Writ of Certiorari to the Supreme Court for the State of Georgia for the following reasons:

> The Supreme Court of Georgia in reversing the State Habeas Court's Findings of Fact, which findings were based on substantial testimonial evidence, and in holding that Cross waived his rights to call witnesses in his behalf by virtue of Cross' trial counsel's failure to move for a continuance, has emasculated, by failing to apply, the landmark doctrine enunciated by this Court in *Johnson v. Zerbst*, 304 U.S. 458, 82 L.Ed. 1461, and its progeny.

The right to offer the testimony of witnesses and compel their attendance is unquestionably a right that affects the fairness and accuracy of the fact finding process. *Washington v. Texas*, 388 U.S. 14, 19; 18 L.Ed.2d 1019.

In finding a waiver of a substantial constitutional right which affects the fairness and accuracy of the fact

finding process, the law has been long established that the State must demonstrate "an intentional relinquishment or abandonment of a known right or privilege". *Johnson v. Zerbst*, 304 U.S. 458, 464; 82 L.Ed. 1461, 1466; *Barker v. Wingo*, 407 U.S. 525, 529.

Courts should indulge every reasonable presumption against waiver of fundamental constitutional rights. *Johnson v. Zerbst*, 304 U.S. 458, 464; 82 L.Ed. 1461, 1466.

Notwithstanding the extensive habeas testimony of E. T. Hendon, Jr. Cross' trial counsel, to the contrary, the Georgia Supreme Court equated Hendon's not moving for a continuance to an "intentional relinquishment or abandonment of a known right or privilege." This, notwithstanding the findings of fact to the contrary by the trier of fact, (the State habeas court), after observing and listening to Hendon's extensive testimony.

The State habeas court found in its Findings of Fact as follows: (Appendix B.)

> "After consideration of all the evidence, it is found that Cross' trial counsel did not intentionally relinquish or abandon Cross' constitutional right to call Blalock as a defense witness."

The factual basis upon which the State Habeas Court made the above findings is very substantial (See Synopsis of E. T. Hendon, Jr.'s testimony, *infra.*)

It is interesting to note here that the Georgia Supreme Court has had a long-standing rule in dealing with findings of fact of habeas courts in criminal cases that where there is "any evidence" to support the habeas court's findings of fact, said findings ought not to be disturbed. See *Allen v. Caldwell*, 231 Ga. 442, 443.

Unless waiver is found, the conviction clearly must fall. Blalock's testimony, which was corroborated on essential and crucial detail by four other witnesses, minimally corroborates Cross' trial testimony, which renders Blalock's testimony exculpatory under *Alcorta v. Texas*, 355 U.S. 28, 31. Blalock's testimony is also evidentiary of an absence of "predisposition" in Cross in contemplation of *Hampton v. United States*, 425 U.S. 484.

The Georgia Supreme Court held that the habeas court applied incorrect law. The law applied by the habeas court is correct, assuming the findings of fact of the habeas court are correct.

The findings of fact by the habeas court were supported by substantial evidence flowing from the testimony of numerous witnesses. Apparently, the Georgia Supreme Court concluded that the evidence in question was not newly discovered, therefore, the habeas court ought not to have applied standards applicable to newly discovered evidence, assuming said evidence was willfully withheld. The habeas court squarely dealt with the proposition of whether the evidence was newly discovered and correctly concluded that what Hendon "knew" properly fell into the category of intelligence, rather than admissible evidence. Thus, the habeas court found no waiver by Hendon (see H.C.T. I, pp. 44, 45).

The habeas court found, as a finding of fact after listening to all of the evidence as follows: (Appendix B.)

> "Upon considering all the testimony, it is found as fact that but for state action, Cross would have been able to compel Blalock's testimony in Cross' defense. The conduct and actions of the state agents involved constituted a willful and knowing withholding of Blalock's testimony.
>
> "The state agents in question denied under oath the aforementioned conduct."

Thus, the habeas court properly applied the first test of *U.S. v. Agurs*, 427 U.S. 97, 49 L.Ed.2d 342, i.e., the "reasonable likelihood" test which is applicable where exculpatory evidence is willfully withheld by state agents and perjured testimony is utilized attendant to such withholding as in the instant case.

CONCLUSION

The state habeas court, after hearing numerous witnesses, made extensive findings of fact. Based on such findings, the state habeas court: properly applied *Johnson v. Zerbst*, 304 U.S. 458 and its progeny, and found

there was no waiver of Cross' right to call witnesses under the Sixth and Fourteenth Amendments in contemplation of law; properly applied, *Alcorta v. Texas*, 355 U.S. 28, in finding the missing witness Blalock's testimony to be exculpatory due to its corroborative nature; properly applied *Hampton v. United States*, 425 U.S. 484, in finding that Blalock's testimony was exculpatory in that said testimony was evidentiary of a lack of predisposition in Cross, thereby supporting Cross' defense of entrapment; and, finally, properly applied the "reasonable likelihood test" of *United States v. Agurs*, 427 U.S. 97, in concluding that the State conduct in question constituted a willful withholding of Blalock's testimony and that the State, through its agents, had utilized perjured testimony to conceal said withholding.

The Supreme Court for the State of Georgia apparently gave little or no weight to the State habeas court's findings of fact, in the face of substantial evidence to support said findings, which action contradicted a line of Georgia Supreme Court cases which generally inures to the detriment of petitioners seeking the writ of habeas corpus.

That is, the Supreme Court of Georgia has steadfastly applied the rule of *Allen v. Caldwell*, 231 Ga. 442, in affirming denials of petitions for the writ of habeas corpus on the proposition that habeas court's findings of fact will not be disturbed where there is *any* evidence to support said findings, yet in the subject case failed to apply its own case law to reverse a granting of Cross' Petition for the Writ of Habeas Corpus.

The above constitutes a denial of due process of law under the Sixth and Fourteenth Amendments and the Supreme Court of the United States ought to inquire into this matter more fully and grant Cross' Petition for Certiorari; and further, reverse the judgment of the Supreme Court of the State of Georgia, thereby reinstating the Writ of Habeas Corpus issued by the DeKalb County Superior Court, State of Georgia.

Respectfully submitted,

THEODORE S. WOROZBYT
2410 Peachtree Center
Cain Tower
229 Peachtree St., N.E.
Atlanta, GA 30303
404/659-7070

Attorney for Petitioner

CERTIFICATE OF SERVICE

I, Theodore S. Worozbyt, hereby certify that I am a member of the bar of the Supreme Court of the United States and that I have served copies of the Petition for Writ of Certiorari in the above-styled case on Counsel for the Respondent by depositing same in the United States mail, first class postage prepaid, addressed as follows:

Mr. Randall Peek
District Attorney
DeKalb Superior Court
Decatur, Georgia 30030

Arthur K. Bolton
Attorney General
State of Georgia
Atlanta, GA 30303

All parties required to be served have been served this ____ day of October, 1979.

THEODORE S. WOROZBYT

APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 76-4379

WILLIAM HOWARD CROSS, SR.,
Petitioner-Appellant,

versus

THE STATE OF GEORGIA,
Respondent-Appellee.

September 28, 1978

Rehearing Denied Nov. 8, 1978

Appeal from the United States District Court for the Northern District of Georgia.

Before JONES, GODBOLD and GEE, Circuit Judges.

JONES, Circuit Judge:

The appellant, William Howard Cross, Sr., was indicted for bribery, convicted and given a five year sen-

tence in the DeKalb County, Georgia Superior Court. His defense was entrapment. The conviction was affirmed by the Georgia Court of Appeals. 136 Ga. App. 400, 221 S.E.2d 615. The Supreme Court of Georgia denied certiorari.

A short time before the occurrence for which Cross was convicted he gave four fifty dollar bills to his co-defendant, Harold Johnson, with an instruction to give the money to Police Sergeant Wendell McGlamory of the DeKalb County Police Department as a belated Christmas gift. Sergeant McGlamory refused to accept the money. Detective Robert W. Young of the Police Department, and Johnson arranged by telephone for a meeting with Cross at an agreed location. Detective Young went to the meeting with a concealed microphone and radio transmitter. Two other officers in a nearby police car received and taped the conversation from Detective Young's transmitter.

Following a brief discussion, Cross said, "How about let's making a deal? I'll give you two hundred dollars now, two hundred dollars on the twenty-fifth of each month, and if you give me information concerning a known figure I'll get you a bonus, or a piece of pie from him, and I'll handle that." Young testified that Cross took two hundred dollar bills from his pocket and gave them to Young. This conversation was taped by the officers in the police car.

Cross was indicted and charged with the offense of bribery of a police officer. He admitted the acts

charged, and asserted entrapment as a defense. Cross was convicted and sentenced to five years imprisonment.

Cross appealed from the denial by the trial court of his motion to suppress the tape recording and the testimony of the three police officers on the ground that this evidence constituted an illegal search and seizure of his conversation because there was no application for, or issuance of, a warrant authorizing electronic eavesdropping under Georgia Code Ch. 26-3000 et seq. The Georgia Court of Appeals rejected this argument. *Cross v. Georgia*, 128 Ga. App. 837, 198 S.E.2d 338. The Supreme Court of Georgia affirmed. *Cross v. Georgia*, 233 Ga. 960, 214 S.E.2d 374. His appeal from the denial of an extraordinary motion for a new trial was consolidated in the Georgia Court of Appeals with the appeal from the judgment of guilt and sentence. *Cross v. Georgia*, 136 Ga.App. 400, 221 S.E.2d 615. Cross has had process in abundance. Whether he has had due process is the issue before this Court.

At the hearing before the district court Cross asserted two claims. His first contention was that the state trial court had deprived him of Sixth and Fourteenth Amendment rights by refusing to admit evidence tendered by him which, he asserts, supported his defense of entrapment. The district court ruled against Cross stating that he "failed to establish the minimum requirements for the defense of entrapment and it does not appear to the Court that the trial court made such a

grievous error as to ignore petitioner's rights on this issue." Before the Court this question is somewhat differently stated. Here the question is said to be "May a 'bribery' defendant who pleads entrapment by coercion attempt to negate his 'predisposition' by showing other acts of coercion by the 'bribed' police officers?" The conduct of the officers in unrelated matters is not pertinent to the issue of the predisposition of the appellant. *Hampton v. United States,* 425 U.S. 484, 96 S.Ct. 1646, 48 L.Ed.2d 113; *United States v. Russell,* 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed.2d 366. We need not decide whether the issue here presented is of Constitutional dimensions. See *United States v. Russell,* supra. There is no Fifth Amendment due process bar to the conviction of the offense of bribery of police officers who anticipated the offense by electronic taping of the incident. *Hampton v. United States,* supra.

The other claim of the appellant is thus stated, "Did the undisputed extrajudicial investigative and prosecutorial activity of the trial court deny appellant a trial by a fair and impartial tribunal?"

A witness subpoena had been issued for Marshall Blalock. Counsel for Cross sought the arrest of Blalock and represented that Blalock would not respond to a subpoena. The judge issued the order for the arrest of Blalock in which bond was fixed for his appearance as a witness, but before doing so the judge telephoned an employee of the person with whom Blalock had been residing. Blalock went to Florida. Whether he went

before or after the telephone call was not shown. Whether the substance of the call was made known to Blalock was not shown. Cross did not meet his burden of showing that he was prejudiced by the injudicious telephone call of the trial judge.

The trial judge, before the trial, with a prosecuting attorney and others, listened to the playing of the tape recording of the "bribe". He also examined the polygraph tests of the officers. Cross contends that these actions were improper and evidenced prejudice on the part of the judge. Due process requires a fair trial before a fair and impartial judge. The conduct of the trial judge during the trial is the measure by which prejudice to the litigant is determined. The district court held that Cross was not prejudiced by the actions of the trial judge. We agree with this determination.

Cross was not deprived of any due process right to a fair trial. The judgment of the district court is

AFFIRMED.

GODBOLD, Circuit Judge, specially concurring:

I concur in the result but with this additional statement.

I agree that Cross was not entitled to introduce evidence tending to show unrelated efforts by the officers to coerce payoffs from other persons, offered on

the theory that it negated Cross' predisposition to commit the bribery offense. In other circumstances such evidence might be admissible as circumstantial evidence of governmental involvement[1] or as impeaching the credibility of the officers, but Cross disclaims any such purpose in this case.

Some of the evidence proffered by Cross and not admitted was not "unrelated." If believed, it would have tended to show efforts by the police officers to coerce Cross through others. As noted by the Georgia Court of Appeals in Cross' merits appeal:

> The claim of entrapment was based upon testimony which tended to show the police officers McGlamery and Young were, through others importuning and inviting Cross to pay the money for protection and information as to raids, etc.

---

1 *U.S. v. Russell,* 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1974) and *Hampton v. U.S.,* 425 U.S. 484, 96 S.Ct. 1646, 48 L.Ed.2d 113 (1976), did not eliminate governmental activity from entrapment law. *U.S. v. Tate,* 554 F.2d 1341, 1344 (CA5, 1977). Without governmental activity entrapment does not become an issue. Now, as before, the purpose of the law of entrapment is curbing governmental activity so excessive as to be unacceptable to a civilized society. *Id.* The sufficiency of the evidence of governmental activity is a question of law for the court in the first instance. *Id.; Pierce v. U.S.,* 414 F.2d 163, 168 (CA5, 1969). If the court concludes that there is sufficient evidence of governmental involvement to submit the entrapment issue to the jury, the jury must consider both the inducing governmental involvement and defendant's predisposition. *Id.*

Cross v. State, 136 Ga.App. 400, 221 S.E.2d 615, 618 (1975). Such evidence was entitled to be considered, not as negating Cross' predisposition but as tending to show governmental involvement. The trial court was, however, entitled to reject the proffered evidence as too tenuous and remote to submit to the jury on the governmental involvement issue. I cannot say that excluding it was error, or if error that it rose to constitutional dimensions.

I agree that on the facts of this case due process does not bar the conviction of the offense of bribery of the police officers who anticipated the defense and electronically taped the incident. I do not understand the court to be holding any more than that. *Hampton v. U.S.,* which is cited as authority for the holding on this point, is not authority that there can never be a due process bar to a police-induced offense of a predisposed person. The opinion of Justice Rehnquist in *Hampton,* advancing the view that due process is not involved when the defendant is predisposed, was joined in by only two other justices. Justices Powell and Blackmun concurred in the result but declined to join in Justice Rehnquist's discussion concerning the predisposed defendant. Three justices dissented on the ground, unrelated to the point I make here, that where a government agent sets up the defendant by supplying him with contraband and then brings in a potential purchaser the defendant is entrapped as a matter of law. See the discussion of this point in *U.S. v. Tate,* supra.

APPENDIX "B"

IN THE SUPERIOR COURT OF
DEKALB COUNTY, STATE OF GEORGIA
STONE MOUNTAIN JUDICIAL CIRCUIT

WILLIAM HOWARD CROSS, SR.,
Petitioner,

versus Case No. 78-6608

PAT JARVIS, Sheriff of DeKalb County,
Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND ORDER

FINDINGS OF FACT

The witness, Marshal Blalock (hereinafter "Blalock"), was a material witness to the transaction underlying the subject conviction.

Blalock was the conduit between the State agents and the Petitioner (hereinafter "Cross"), i.e., Blalock passed communications between McGlamery and/or Young to Harold Johnson (Cross' co-defendant, hereinafter "Johnson"), and/or Cross.

Officers McGlamery and Young, at all times relevant, were agents of the State. Blalock, at all times relevant, was McGlamery's informer and agent in fact. Blalock was also, at all times relevant, a close friend of McGlamery and Young.

Blalock and Young were also business partners in a certain Southern Vinyl Top Company on DeKalb Avenue.

Blalock's testimony corroborates, on crucial issues, the testimony given by Johnson and Cross at the trial of the subject case. Blalock's testimony, independent of its corroborative nature, lends itself to and supports a reasonable theory of entrapment.

Blalock's testimony, therefore, is exculpatory.

Had Blalock's testimony been available to the defense, the testimony of Blalock's wife, Peggy, and Blalock's daughter, Pamela, would also have been available.

The testimony of Blalock's wife and daughter would have corroborated Blalock's testimony regarding the relationship and communications between Blalock and McGlamery during the four-month period of time immediately preceding the departure of the Blalock family in late March or early April to Florida.

Upon considering all the testimony, it is found as fact that but for State action, Cross would have been able to

compel Blalock's testimony in Cross' defense. The conduct and actions of the State agents involved constituted a willful and knowing withholding of Blalock's testimony.

The State agents in question denied under oath the aforementioned conduct.

Cross' defense counsel was very desirous of procuring Blalock's testimony in Cross' defense and considered Blalock's testimony crucial to the presentation of the defense of entrapment.

Cross' trial counsel had reason to believe that Blalock was reluctant to testify and that Blalock would not respond to ordinary subpoena process. Cross' trial counsel applied for and obtained extraordinary court process as a means of obtaining Blalock's testimony, which was unsuccessful.

Cross' trial counsel diligently sought, by all legal means available, to procure the testimony of Blalock.

After consideration of all the evidence, it is found that Cross' trial counsel did not intentionally relinquish or abandon Cross' constitutional right to call Blalock as a defense witness.

After consideration of all the evidence, it is found as fact that there is a reasonable likelihood that the jury's verdict in the subject case would have been affected had Blalock testified in Cross' defense.

CONCLUSIONS OF LAW

The constitutional right to call witnesses for the defense embodied in the Sixth and Fourteenth Amendments to the United States Constitution and under the Georgia Constitution is a right that affects the truth finding process. It has not been shown that Cross intentionally relinquished or abandoned the aforementioned right. That, but for State action, in contemplation of law Cross would have been able to avail himself of his Sixth and Fourteenth Amendment right of compulsory process.

That the standard applicable under the facts of this case is the "reasonable likelihood" standard, i.e., the first variation of the *Brady v. Maryland* doctrine as taught by *Agurs v. United States*. That due process under the Fourteenth Amendment means, in essence, fundamental fairness; and that Cross was denied same pursuant to the subject conviction.

That the administration of criminal justice requires that no citizens be denied due process. It is in the interest of preserving the integrity of our criminal judicial system and the humanity of our system of jurisprudence that Cross' conviction be voided and set aside.

CONCLUSION AND ORDER

Cross' judgment conviction for the offense of bribery and the attendant sentence of five years in the State penitentiary are hereby vacated and set aside.

Cross' petition for the Writ of Habeas Corpus is granted to the extent that a new trial is ordered. Cross is authorized to post good and sufficient bond contingent upon his appearance at such new trial in the amount of $5,000.00.

SO ORDERED.

This the 19th day of January, 1979.

Hubert C. Morgan
Judge, Superior Courts
Stone Mountain Judicial
Circuit

Georgia, DeKalb County

I, Chandler Bridges, Clerk Superior Court in and for said County, hereby certify that the above is a true and correct copy of Order of Court in the above stated case, as the same appears of file and of record in this office.

Witness my hand and seal of said Court this the 8th day of August, 1979.

/s/ CHANDLER BRIDGES
Clerk Superior Court
DeKalb County, Georgia

APPENDIX "C"

In the Supreme Court of Georgia

Decided: June 20, 1978

34822. JARVIS, Sheriff v. CROSS

BOWLES, Justice.

Cross was convicted of bribery in 1974. He had admitted the crime but alieged entrapment. His extraordinary motion for new trial was overruled by the trial court. Both these decisions were affirmed by the Court of Appeals in *Cross v. State*, 136 Ga. App. 400 (221 S.E.2d 615) (1975) and this court denied certiorari. Cross then filed habeas corpus petitions in federal court and relief was denied him both at the district court level and in the Fifth Circuit Court of Appeals.[1] Two weeks later, Cross filed his petition for writ of habeas corpus in the DeKalb Superior Court alleging "newly discovered evidence." He contends that his Sixth Amendment right to call witnesses in his own behalf was abridged in that a police officer was instrumental in having a witness, one Blalock, avoid Cross' subpoena and leave the state. Allegedly, Blalock could have corroborated Cross' entrapment theory. The habeas court granted the writ and ordered a new trial.

We reverse.

1 See Cross v. Georgia, 581 F.2d 102 (1978).

The trial court applied incorrect law in reaching its decision. The "evidence" in question was not newly discovered. Trial counsel for Cross testified at the habeas hearing and stated that *prior to trial* he had "learned" that the police officer in question "apparently had gotten to him [Blalock] and he had fled." In fact, counsel cross-examined the two officers on the stand on this point. In addition, he apparently knew of a witness, already under subpoena, who could have helped substantiate the allegation. Cross' proper remedy at trial was a motion for continuance when he learned of Blalock's absence. See *Murphy v. State*, 132 Ga. App. 654 (209 S.E.2d 101) (1974). A defendant cannot assert his defenses piecemeal, *Wallace v. Foster*, 206 Ga. 561 (57 S.E.2d 920) (1950), thus extending indefinitely the appellate process.

Furthermore, even assuming that the police officers encouraged Blalock to avoid testifying and assuming this fact were newly discovered, Blalock's testimony at the habeas hearing added nothing to substantiate Cross' allegation of entrapment. Wrongdoing by state officers is, of course, inexcusable and reprehensible yet the wrongdoing alone will not justify a new trial. As was stated in *United States v. Agurs*, 427 U.S. 97 at 110 (96 S.Ct. 2392, 49 L.Ed.2d 342) (1975): ". . . if evidence actually has no probative significance at all, no purpose would be served by requiring a new trial simply because an inept prosecutor incorrectly believed he was suppressing a fact that would be vital to the defense. If

the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor."

Judgment reversed. All the Justices concur.

APPENDIX "D"

CLERK'S OFFICE
SUPREME COURT OF GEORGIA

ATLANTA

July 18, 1979

Dear Sir:

The motion for a rehearing was denied today: Case No. 34822, Jarvis, Sheriff v. Cross.

Yours very truly,

MRS. JOLINE B. WILLIAMS,
Clerk.

Supreme Court, U. S.
FILED
NOV 8 1979
MICHAEL RODAK, JR., CLERK

79-636

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-636

WILLIAM HOWARD CROSS, SR.,
Petitioner,

versus

PAT JARVIS, SHERIFF,
Respondent.

BRIEF OF RESPONDENT

RANDALL M. PEEK
District Attorney
Stone Mountain Judicial Circuit

ALTON G. HARTLEY
Assistant District Attorney
Stone Mountain Judicial Circuit

C. DAVID WOOD
Assistant District Attorney
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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
1. Procedural Posture	1
2. The Facts At Trial	3
3. The Habeas Corpus Facts	4
REASONS WHY THE WRIT SHOULD NOT BE GRANTED	10
CONCLUSION	17
CERTIFICATE OF SERVICE	18

TABLE OF AUTHORITIES

Page

Cases:

Agurs v. United States, 427 U.S. 97; 49 L.Ed.2d 342.. 15

Alcorta v. Texas, 355 U.S. 28, 31..... 14

Allen v. Caldwell, 231 Ga. 442, 443..... 13

Barker v. Wingo, 407 U.S. 525, 529..... 12

Cross v. The State, 128 Ga. App. 837..... 4

Cross v. The State, 136 Ga. App. 400.....1, 4, 6

Cross v. Georgia, 581 F.2d 102 at 104 (5th Cir. 1978)..... 6

Hampton v. United States, 425 U.S. 484..... 14

Johnson v. Smith, 225 Ga. 519..... 13

Johnson v. Zerbst, 304 U.S. 458, 464; 82 L.Ed. 1461.....10, 11

Mooney v. Holohan, 294 U.S. 103..... 15

Washington v. Texas, 388 U.S. 14; 18 L.Ed.2d 1019... 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NO.

WILLIAM HOWARD CROSS, SR.,
Petitioner,

versus

PAT JARVIS, SHERIFF,
Respondent.

BRIEF OF RESPONDENT

STATEMENT OF THE CASE

1. PROCEDURAL POSTURE.

Respondent, William Howard Cross, Sr., hereinafter called "Cross", was indicted in DeKalb County, Georgia, charged with the offense of the bribery of DeKalb County Police Detective Robert W. Young. He admitted the money payment and pled entrapment as a defense. Trial was held on the issue April 15-19, 1974, before Judge Thomas Allen and a jury. Cross was found guilty by the jury and sentenced to 5 years. (Trial Transcript T-1190). Cross appealed from this conviction to the Georgia Court of Appeals, Case Numbers 50772 and 50773; see 136 Ga. App. 400 (1975). This appeal was consolidated with Cross's appeal from the trial court's overruling of his Extraordinary Motion for New Trial. 136 Ga. App. 400 at 401. All issues raised therein were determined adversely to

Cross. The Supreme Court of Georgia denied cert. January 8, 1976, No. 30717. Cross then filed Habeas Corpus petitions with the United States District Court for the Northern District of Georgia alleging that a vital witness, Marshal Blalock (hereinafter Blalock) had been led to flee the jurisdiction of the court through improper actions of the trial Judge, Judge Allen. Relief was denied in the District Court, whose decision was affirmed by the Fifth Circuit, United States Court of Appeals, on September 28, 1978. A petition for rehearing was denied by that court on November 8, 1978.

Cross was then arrested by the DeKalb Sheriff's Office, to begin serving his sentence, whereupon he filed, on November 22, 1978, a Petition for Writ of Habeas Corpus in the Superior Court, for the County of DeKalb, State of Georgia, Case No. 78-6608.

The grounds of the petition were based on alleged "newly discovered" evidence (Cross Petition, Par. 8), specifically, Cross now alleged that Blalock had fled the State prior to Cross's trial due not to the improper actions of Judge Allen but due to actions of a member of the DeKalb County Police Department, one Wendell C. McGlamery (hereinafter McGlamery).

The matter was heard before Judge Hubert C. Morgan, Judge Emeritus of the DeKalb Superior Court. After the hearing, Judge Morgan granted Cross's Writ, and granted Cross bond in the amount of $5,000. (Habeas R. 53). The State then appealed to the Supreme Court of Georgia, which on June 20, 1979, reversed Judge Morgan in an unanimous opinion. (Habeas, R. 4). Cross's Motion for Rehearing was denied on July 18, 1979.

Cross then petitioned the Georgia Supreme Court with a Motion to Stay the Remittitur, which if granted would prevent Cross's rearrest. This motion was denied and the remittitur was transmitted to DeKalb County.

Before the State could execute an arrest warrant on Cross, his attorney secured a stay from Judge Morgan, the same judge who had issued the above Writ of Habeas Corpus. The order which Cross's attorney admits was signed by Judge Morgan while in the State of Texas, stayed DeKalb authorities from arresting Cross pending decision by the U. S. Supreme Court on the Writ of Certiorari or until further order of the court. (Habeas, R. 15).

The State has appealed this stay and that matter is now before the Supreme Court of Georgia, being Case Number 35579. (Habeas R. 1.)

2. THE FACTS AT TRIAL.

The factors leading up to Cross's arrest and trial are these. A short time prior to the occurrence of the bribe for which he was on trial, Cross gave four fifty dollar bills to his co-defendant, Harold Johnson, and told Johnson to give them to Sgt. Wendell McGlamery of the DeKalb County Police Department as a belated Christmas present. McGlamery told Johnson to tell Cross to take the money back and "cram it". (T. 933 and T. 220). On January 26, 1972, a telephone conversation occurred between Johnson (not the alleged entrapper Blalock) and Detective Young, and a meeting was set up at a designated location. (T. 222). This conversation between Young and Johnson was intercepted and taped. (T. 221). Detective Young, equipped with a microphone and radio transmitter, went to the meeting place where he was introduced

to Cross by Johnson, (Blalock was not present), (T. 225-227), and after some discussion, the following took place, according to Detective Young, quoting Cross: " 'how about let's making a deal, I'll give you $200.00 now, $200.00 on the 25th of each month, and if you give me information concerning a known figure, I'll give you a bonus, or a piece of pie from him, and I'll handle that.' (T. 464). He (Cross) then took $200.00 . . . two one hundred dollar bills, out of his right pants pocket and handed them to me." (T. 464). This conversation was also taped by two other police officers a short distance from the scene and the tape preserved. (T. 468). These tapes were involved in a Motion to Suppress, which was denied. See *Cross v. State,* 128 Ga. App. 837. There was nothing in the taped conversations indicating any entrapment. See language of the Court of Appeals decision, *Cross v. State,* 136 Ga. App. 400, et seq. The claims of entrapment were based upon testimony allegedly showing that Officers Young and McGlamery were, through Johnson and Marshal Blalock, importuning and inviting Cross to pay the money for protection and information as to raids. At the trial, both Cross and Johnson, his codefendant, (tried separately) testified extensively on the entrapment theory. (T. 901-1035).

3. THE HABEAS CORPUS FACTS.

The present stage of the litigation arises out of alleged State conduct as to the nonappearance at trial of a defense witness Blalock. Blalock was allegedly subpoened in November, 1973 for the first setting of the Cross trial. The trial was not held that November, but was held the following April. (T. 2). When the case was called for trial in April, 1974, it developed that Blalock had voluntarily

left the Court's jurisdiction, apparently for Jacksonville, Florida. (T. 2). The defense specifically did not ask for a continuance based on this nonappearance of Blalock. (T. 1 and 2). The newly discovered evidence upon which Cross based his State Habeas Corpus Petition was that Detective McGlamery allegedly caused Blalock to avoid Cross's subpoena process and to leave the jurisdiction of the State prior to the April, 1974 trial. This, Cross alleged, deprived him of due process and of his right to call witnesses in his behalf under the Sixth and Fourteenth Amendments to the United States Constitution and under the Constitution of the State of Georgia. McGlamery denied this conduct. H.C.T. II, 45, 47 and 48.

a. JUDGE HENDON'S TESTIMONY.

From the testimony elicited before Judge Hubert Morgan on this Habeas Corpus petition, it is very clear that Blalock was an unwilling witness. Cross's trial counsel, now Judge E. T. Hendon of the DeKalb County Superior Court, stated on H.C.T. I, 25-26, that Blalock had told him directly that he would not appear in response to a subpoena. Judge (then attorney) Hendon asked the trial Judge (Tom Allen) for an arrest order and bond to be executed on Blalock. Subsequent to this, Judge Allen telephoned an acquaintance of Blalock advising them to aid in getting Blalock to appear. This, Cross alleged, resulted in Blalock being tipped off and fleeing. H.C.T. I, 27 and 28. This alleged misconduct and error of the trial judge (Judge Allen) was incorporated in Cross's Extraordinary Motion for New Trial and the earlier Federal Habeas Corpus Petition. Judge Allen was upheld on both State and Federal levels. The testimony of Blalock on the hearing of the State Habeas Corpus petition, however, was to the effect that Officer McGlamery caused him to

flee the State earlier than he had orginally intended by informing him he was being sought and would be compelled to appear as a witness at the April, 1974 trial. H.C.T. II, 14-15. Cross's attorney (now Judge E. T. Hendon) stated, however, H.C.T. I, 29, that,

> "There were several other matters that came to my attention during and after the trial that I thought were extremely important. But, specifically as it related to Blalock, there was prosecutorial misconduct to begin with on behalf of the State's witnesses, McGlamery and Young, in participating and causing this witness to abscond and be unavailable for trial." H.C.T. I, 29.

Judge, (then attorney) Hendon again states, H.C.T. I, 33: "Now at that point (referring to the first day of the April, 1974 trial) I had learned that your witnesses, Mr. McGlamery and Mr. Young, apparently had gotten to him and he had fled and I had not been able to serve him with this arrest order." This conduct, although known to Cross as shown above, had not, however, been argued earlier along with Judge Allen's alleged misconduct in phoning Blalock's acquaintance either on State or Federal level. See *Cross v. State*, 136 App. 400, and *Cross v. Georgia*, 581 F.2d 102 (1978).

Again, on H.C.T. I, 36, Judge (then attorney) Hendon states that he actually believed that he *had* made McGlamery's conduct a part of his earlier Federal Habeas Corpus motions and Extraordinary Motion for New Trial, that he had information at that time that the officers had allegedly decoyed Blalock away and had indeed confronted McGlamery with this at the trial on cross examination. H.C.T. I, 37. In fact, there is no mention of these matters in the earlier Extraordinary Motion for New Trial or the Federal Habeas Corpus.

On H.C.T. I, 42, Judge Hendon stated that although he knew of the above actions by the officers, he, in his opinion, had no admissible evidence of this to ask for continuance or to put it in the Extraordinary Motion for a New Trial. He thus made no attempt to perfect the record by asking said continuance. (T. 1 and 2).

Casting further light on this matter is the testimony of Richard Bell, who in 1974 was the District Attorney in DeKalb County. Testifying at the Habeas Corpus hearing before Judge Morgan, Mr. Bell stated that on the morning of the first day of the trial, April, 1974, there was a discussion of the Blalock matter before Judge Allen in chambers. There Mr. Hendon was asked if he had registered his list of witnesses with the Clerk of Court as provided by law for enforceable subpoenas. Mr. Hendon replied that he had not. Regarding the subpoena for Blalock, he (Hendon) replied he had prior (November, 1973) issued one he called a continuing subpoena, but he said he did not want a continuance, that he wanted to go ahead with the trial. Mr. Hendon further stated to Mr. Bell that he (Hendon) had represented Blalock and that, "he could get him there if he wanted him there." H.C.T. II, 56-58.

b. BLALOCK'S TESTIMONY.

Blalock's testimony regarding his leaving Georgia for Florida was that:

> "He (McGlamery) came by one day and told me that if I was going to go to Florida, I better get on out from here; that Judge Allen was issuing a warrant for me to put me under bond so I'd have to stay here and go to court . . . . (H)e said E. T. (Hendon) was going to serve it on me . . . that Sheriff Bonner had two deputies assigned to find me." H.C.T. II, 15.

Blalock states that he then went to Covington, stayed with his brother and at a hotel for two or three days, then got a U-Haul trailer, packed his family, and left for Florida. H.C.T. II, 15-16.

On cross examination by Assistant District Attorney Al Hartley, Blalock was confronted with evidence introduced into the record, being a certified copy of his conviction in Federal District Court of the Northern District of Georgia on a crime involving moral turpitude. H.C.T. II, 17. Blalock pled guilty to four counts, including devising a mail fraud scheme, using ficticious names in the same, making false statements to an agency of the U. S. Government, in Criminal Information CR 76-213A. Further cross examination of Blalock revealed that Blalock had intended to move to Florida before he had ever known the trial was coming up. H.C.T. II, 19. Blalock had previously arranged for a job in Florida. H.C.T. II, 20. Blalock further admitted that when Judge (then attorney) Hendon wanted him to be a witness, he had told him that he didn't want to get involved and further may have told him that what he would say would not help. In fact, at the Habeas hearing Blalock stated he may have said anything to Judge Hendon. This exchange was followed by a question from Assistant District Attorney Mr. Hartley: "Is it possible you could say anything now?" A. "Well, I guess it is." H.C.T. II, 21.

On redirect examination, Blalock stated that although he had previously planned to move to Florida, that he had accelerated his plans by a week or two after talking with McGlamery. H.C.T. II, 22. Again this entire meeting and conversation was denied by Sgt. McGlamery. H.C.T. II, 45, 47, 48.

Mrs. Blalock and Pamela Blalock also testified that McGlamery had visited their apartment in the time preceding the Florida move. Neither, however, overheard any conversation between McGlamery and Blalock regarding any urging of Blalock to leave the state. H.C.T. II, 27, 28, 31, 32. On cross examination of Mrs. Blalock, the State introduced into evidence a certified copy of her conviction in Federal District Court, Northern District of Georgia, of a crime involving moral turpitude. H.C.T. II, 29. Her offense was similar and connected with Blalock's above described and is CR-76-213A.

Later in the hearing Blalock was recalled for cross examination by the State. He then testified that he had never been subpoened prior to the January 1979 Habeas Corpus hearing. H.C.T. III, p. 3. On redirect, he then stated that he had been offered a subpoena for an earlier setting of the trial in November, 1973, (the trial had then been continued), but had refused it as the server wasn't an officer. Blalock had then been handed a piece of paper, which he didn't look at, and was told by the server it was a subpoena. H.C.T. III, 4. Again all this occurred in November of 1973.

Blalock states that his reason for coming forward now is not fear of Cross, (H.C.T. II, 6), but states that although he doesn't remember, he is not certain that he didn't tell Officer Young, in a telephone conversation, that he didn't want to wind up like Cross's codefendant, Harold Johnson, (dead). H.C.T. II, 6. This expression of Blalock's fear of Cross was confirmed by Officer Young, (H.C.T. II, 62 and 63) and Sgt. McGlamery, H.C.T. II, 47.

c. McGLAMERY'S TESTIMONY.

In cross examination of Sgt. McGlamery, the police

officer stated that he did not tell Blalock about the court process or arrest that Judge (then attorney) E. T. Hendon had procured from Judge Allen to insure Blalock's attendance. H.C.T. II, 43. This was elaborated on in the following direct testimony. H.C.T. II, 45, 46, 47. There McGlamery states that Blalock had phoned him about testifying and had said that Judge Hendon had talked to him and asked McGlamery's opinion. McGlamery told him, in effect, to use his own judgment. See H.C.T. II, 46 and 47. This conversation occurred in late 1973 regarding the November, 1973 trial, not the April, 1974, period when Blalock moved! H.C.T. II, 49. Further, McGlamery said that Blalock had not mentioned to McGlamery that he was under subpoena in November, 1973, if indeed he was under subpoena at the time of the said phone call. H.C.T. II, 50.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

The State urges that this Court should not issue a Writ of Certiorari to the Supreme Court of Georgia. In urging rejection of Cross's Writ, the State basically will go no further than arguments relying on the facts of the case and using as authority the cases Cross has cited in his Petition to this Court.

The contention that the Georgia Supreme Court has emasculated the doctrine of *Johnson v. Zerbst*, 304 U.S. 458 is unsupported when a comparison of the facts of the two cases is made. In *Zerbst*, the defendant, an alleged counterfeiter, was also a military enlistee far from home, with little education, no friends or family in the forum jurisdiction and no money. Under the then existing forum law, he was not allowed an attorney and was tried and

convicted without an attorney's assistance. This Court properly found that the average layman did not have skills necessary to act as his own attorney. The denial of attorney was thus so fundamental as to jeopardize all other protections of the Constitution. However, in *Zerbst* this Court went on to state that the question of waiver must be considered upon the facts and circumstances of each case. *Zerbst* at 464. Here, Cross has had the benefit of skilled counsel at each of the many stages of these proceedings. Inherent in *Zerbst* is the assumption that under proper circumstances a constitutional right may be waived. Here, Blalock was allegedly subpoened for a trial in November, 1973. The trial did not occur until April, 1974. (T. 1-2). Blalock was never resubpoened and the defense subpoena list was never filed with the Clerk. H.C.T. II, 56-58. Cross had counsel before, during, and after that trial. Counsel knew at trial that Blalock had left and believed that McGlamery and Young had caused this action. H.C.T. I, 33. However, counsel did not ask a continuance or attempt any showing thereof on the record to preserve any error. (T. 1-2). In fact, he told the (then) district attorney that he did not want a continuance and that ". . . he could get him (Blalock) there if he wanted him there." H.C.T. II, 58.

Further Cross's counsel believed that he had made the alleged police conduct with regard to Blalock an issue in the earlier Federal Habeas Corpus. H.C.T. I, 36. He certainly knew of the allegations, H.C.T. I, 37, by his own admission, but no such allegations are to be found in the Federal Habeas Corpus. The State feels that, based on the above, it would be difficult to find a case wherein the circumstances of the waiver of a constitutional right are more unlike *Zerbst*.

Although the right to offer witnesses' testimony and

to compel attendance is a right affecting the fairness and accuracy of the fact finding process, it is unfair to equate the present situation with that of *Washington v. Texas*, 388 U.S. 14. There, by virture of a state law, a common law holdover, codefendants were incompetent to testify in each other's behalf by operation of the said State law. The defendant, charged with murder, was sentenced to death because a codefendant was not allowed to testify that he, not Washington, had shot the victim, while Washington tried to prevent the shooting. This Court properly found that the codefendant's testimony was relevant and material and even vital to Washington. *Washington* at 16.

Unlike *Washington*, we deal here with voluntary waiver, not denial of the use of witnesses by operation of state law. Here Blalock's testimony at most would be merely cumulative of testimony already presented at trial both by Cross and Johnson as to the alleged entrapment.(T. 901-1035). Johnson was not tried together with Cross and was therefore not before the jury as a codefendant at that time.

Cross's citation of *Barker v. Wingo*, 407 U.S. 525, is puzzling as that case dealt with a demand for speedy trial not here at issue. However, with regard to the proposition that the State must show "intentional relinquishment or abandonment of a known right or privilege", when a substantial constitutional right affecting the fairness and accuracy of the fact finding process is involved, the State contends that such showing has been made. Cross's counsel twice has stated that he did not want a continuance, (T. 1, 2) and H.C.T. II, 56-58. He further stated that if he had wanted Blalock he could get him. H.C.T. II, 58. This, the State urges, is clearly a voluntary,

knowing waiver.

Cross urges that the Supreme Court of Georgia acted in a manner not in keeping with its previous decisions in habeas corpus appeals, quoting *Allen v. Caldwell*, 231 Ga. 442, 443, to the effect that the court would affirm the habeas court if there were "any evidence" to support its finding of facts. The *Allen* case involved a ruling against the habeas petitioner. The theory behind the referenced *Allen* quote may be found in the earlier case on the point, *Johnson v. Smith*, 225 Ga. 519 (1969). Therein, the Georgia Supreme Court in affirming the habeas court's denial of habeas, stated, "In dealing with these contentions, it should be kept in mind that a presumption exists in favor of the validity of sentences . . . ." In other words, after a guilty plea or jury verdict, the presumption is with the validity of said judge or jurors finding of fact at trial level. This is the meaning of the line of cases of which *Allen* is a part.

Cross states that Blalock's testimony is corroborated by four other witnesses. (See Cross Petition 22). While this may be technically correct, a perusal of the testimony of the habeas hearing shows that the testimony of the so-called corroborating witnesses merely relates what Blalock told them as to why he left the State rather than appear at Cross's trial. There is no evidence independent of Blalock's revelations that he was told to leave by Sgt. McGlamery. The so-called corroboration shows only that Blalock repeated this story to four persons. The mere fact that a story is often told does not render it factual. If the case was otherwise, many colorful American legends—Paul Bunyan, for example, would be history. In the last analysis, the only source of the Sgt. McGlamery story is Blalock. This is the same Blalock who is a convicted

felon, and who comes forward with this story five years after Cross's conviction, a "deus ex machina", at the very moment that Cross's appeals run and he begins serving his sentence.

Cross urges that his conviction must fall under the authority of *Alcorta v. Texas*, 355 U.S. 28, and *Hampton v. United States*, 425 U.S. 484, on the basis that Blalock's testimony minimally corroborates Cross's trial testimony and shows absence of "predisposition" on Cross's part to bribe police officer Young. A reading of *Alcorta* shows that the case did not turn on minimal corroboration. Alcorta was charged with killing his wife. He urged that he caught her in another man's arms and killed in heat of passion. The alleged lover denied any relationship with the deceased. Alcorta was convicted of first degree murder and sentenced to death. The "lover" later changed his story, saying that the deceased was not only his lover but was in his arms on the night of her death, and that the state prosecutor had known this at the time of trial. This Court quite properly held that if the lover had testified truthfully at trial, it would vitally corroborate Alcorta's passion defense. Thus *Alcorta* turns on material—vital—corroborative testimony, not minimal corroboration of testimony of Cross and another witness, Johnson, at trial to similar effect on alleged entrapment.

Cross's reliance on *Hampton* is similarly misplaced. There, no entrapment was found in much stronger circumstances than the case at bar. Hampton was convicted of sale of heroin to police agents. A pool-playing acquaintance—Hutton—a DEA informer, set up the sale, directed Hampton to the sale location and accompanied him while Hampton sold. This occurred twice. Hampton contended that Hutton had provided the drugs, telling

Hampton that they were fake drugs and it was a joke. Hutton evidently was not at the trial. The jury did not believe Hampton's story, convicting him. The key, this Court stated in opinion, was not conduct of the government agent but the predisposition of Hampton to commit the crime.

Here although Cross urged at trial that Blalock and Johnson (Johnson testified at trial) urged him to meet with McGlamery and Young to work something out, the trial testimony is clear that Blalock did not even accompany Cross, when he and Johnson picked up Young in their Cadillac and drove to the middle of an empty shopping center parking lot at night to talk. (T. 462, et seq.). Blalock was not present when Johnson (who did testify) introduced Cross to Young and sat with them in the Cadillac while the incriminating conversation ensued. (T. 462, et seq.). When Cross broached the subject of money to Young as shown on the tape recordings, Blalock was conspiciously absent. There is no way that the absent Blalock's testimony can show a lack of predisposition on Cross's part, when Johnson's testimony before the jury was unable to do so, and Johnson was present and speaking at the scene.

There is, therefore, even if the first *Agurs v. United States*, 427 U.S. 97 standard was properly applied, no reasonable likelihood that the trial verdict would have been different. The state officer has denied sending Blalock out of state. (H.C.T. II, 44-48). Blalock maintains that he was sent. This, the State urges, is clearly insufficient to create a presumption that it was the State's case which contained the perjured testimony as in *Mooney v. Holohan*, 294 U.S. 103.

In *Agurs*, the defendant urged error in that the prosecutor failed to disclose the victim's record of violence which she contends would have aided her self defense arguments. This Court found firstly that she (her attorney) had not asked for the record. Here, Cross's attorney asked for no continuance to locate and compel Blalock's attendance. In fact, he stated on the record (T. 1-2) that he was not asking a continuance. The record did not rise to an inference of perjury. Finally the court remained convinced of guilt when considering the whole record. In *Agurs* this Court stated, "Unless every nondisclosure is regarded as automatic error, the constitutional standard of materiality must impose a higher burden on the defendant than the harmless error rule . . . . This means that the omission must be evaluated in the context of the entire record . . . . If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial." *Agurs*, 112-113.

It is interesting that the evidence in *Agurs* was largely cumulative of the evidence presented to the jury by the victim Sewell's wearing of a bowie knife and another knife when he was killed. Here, Blalock's evidence on alleged entrapment would be merely cumulative of Cross and Johnson's trial testimony on the same issue. Therefore, even were the first *Agurs* standard applied, and the State contends that on these facts it would not be properly applied, that there is no reasonable likelihood that the verdict would have been different had Blalock made himself available then rather than five years later.

CONCLUSION

The State therefore respectfully requests that this Court deny petitioner Cross's petition for Writ of Certiorari, leaving undisturbed the decision of the Supreme Court of Georgia overruling the Writ of Habeas Corpus issued by the DeKalb County Superior Court, State of Georgia.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, _____, hereby certify that I am a member of the bar of the Supreme Court of the United States and that I have served copies of the Response to the Petition for Writ of Certiorati in the above-styled case on Counsel for Petitioner by depositing same in the United States mail, first class postage prepaid, addressed as follows:

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All parties required to be served have been served this ____ day of November, 1979.

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